

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Standardizing Program Reporting	)	MB Docket No. 11-189
Requirements for Broadcast Licensees	)	
	)	
	)	

**JOINT COMMENTS OF THE  
NORTH CAROLINA ASSOCIATION OF BROADCASTERS,  
THE OHIO ASSOCIATION OF BROADCASTERS, AND  
THE VIRGINIA ASSOCIATION OF BROADCASTERS**

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## SUMMARY

The North Carolina Association of Broadcasters, the Ohio Association of Broadcasters, and the Virginia Association of Broadcasters submit these Joint Comments in response to the Commission's *Notice of Inquiry* in the above-captioned proceeding relating to standardized program reporting requirements. In the *Notice*, the Commission proposes to replace the issues/programs list that television stations are currently required to compile and place in their public files with an electronic standardized disclosure form that would be included in each station's proposed online public to be hosted by the Commission.

While the Associations certainly support any effort to streamline regulatory requirements, the proposal under consideration, in essence, would impose new regulatory requirements rather than relieve regulatory burdens. For nearly 30 years, the Commission has followed a market-based approach to public interest programming, where stations are permitted to exercise discretion in providing programming that is responsive to community issues, interests, and concerns, while reporting examples of such programming on a quarterly basis. The proposal under consideration would gut this long-standing regulatory approach, albeit under the guise of streamlining. The proposal would replace discretion with restrictive and government-mandated program categories, established and defined by third-party advocacy groups, not local broadcasters or even local citizens. Such a requirement would provide only a narrow reflection of a station's issue-responsive programming and tack backward to a burdensome regulatory scheme long ago rejected.

Moreover, as it is currently conceived, the Commission's proposal would require stations to track and compile new information and evaluate program material to determine which of three narrowly-drawn content categories is satisfied. The proposed categories would effectively place a higher value on some categories of programming over others, and the tracking and reporting of such information on a composite or sample basis would effectively require broadcasters to reinstitute burdensome program logs. These proposed requirements are contrary to the Commission's long-standing policy of respecting stations' editorial discretion, and they would, if put into practice, be unlikely to serve the Commission's intended purposes as articulated in the *Notice*.

The Associations urge the Commission to reconsider the proposal and to consider retention of the current issues/programs list. Alternatively, the Associations urge the Commission to consider the development and testing of a content-neutral standardized form which preserves broadcasters' flexibility to identify various types of programming (not predefined categories) as responsive to community issues and concerns.

If the Commission determines that the adoption of an online standardized version of the issues/programs list is in the public interest, then the Associations urge the Commission to adopt a version which is no more burdensome than the present requirement; that does not explicitly or implicitly alter the existing, "market-based" regulatory flexibility for stations to air programming that is responsive to community interests and concerns; and that does not implicitly attempt to interfere with stations' editorial discretion over programming content.

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The North Carolina Association of Broadcasters (“NCAB”), the Ohio Association of Broadcasters (“OAB”), and the Virginia Association of Broadcasters (“VAB”) (collectively, the “Associations”), through their attorneys, hereby jointly submit these comments in response to the Commission’s Notice of Inquiry, FCC 11-169, (the “*Notice*”) in the above-captioned proceeding relating to standardized program reporting requirements.

**I. INTRODUCTION AND BACKGROUND**

The Associations are non-profit organizations representing the interests of broadcasters in their respective states. NCAB has 36 television and 206 radio members. OAB has 55 television and 267 radio members. VAB has 31 television and 183 radio members.

In the instant proceeding, the Commission seeks comment on a proposal to replace the quarterly issues/programs list that television stations have been required to compile and place in their public files for decades with an online standardized disclosure

form that uses a sample-based methodology and limited reporting categories.<sup>1</sup> With the *Notice*, the Commission revisits, yet again, the standardized form adopted in the 2007 *Enhanced Disclosure Report and Order* (“2007 Order”),<sup>2</sup> which the Commission vacated in a companion proceeding.<sup>3</sup> In its place, the *Notice* now proposes to require television broadcasters to report on their programming using a sample-based methodology and seeks comment on the proposed reporting categories. The *Notice* also proposes that the standardized form would be included in each station’s proposed online public file to be hosted by the Commission.<sup>4</sup> For the reasons discussed below, the Associations urge the Commission to reconsider the proposal, as it is currently conceived. The Commission should consider retention of the current issues/programs list requirement or, if the Commission determines that the adoption of an electronic version of the issues/programs list is in the public interest, it should adopt a version which is less (or, at least, no more) burdensome or costly than the present requirement, that does not explicitly or implicitly amend (or undermine) the fundamental nature of the existing flexible, “market-based” requirement to air programming that is responsive to community issues, interests and concerns, and that does not implicitly (and impermissibly) attempt to drive content-based programming decisions.

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<sup>1</sup> See *In the Matter of Standardizing Program Reporting Requirements for Broadcast Licensees*, Notice of Inquiry, 26 FCC Rcd 16525 (2011), ¶1 (the “*Notice*”).

<sup>2</sup> See *In the Matter of Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations*, Report and Order, 23 FCC Rcd 1274 ¶¶ 19-20 (2007).

<sup>3</sup> See *Notice* ¶ 1.

<sup>4</sup> The Associations have separately filed Comments and Reply Comments regarding the proposed online public file in MB Docket 00-168.

In preparation for these comments, the Associations conducted surveys of television members regarding the issues raised in the *Notice*. The survey responses indicate that North Carolina, Ohio, and Virginia broadcasters produce and/or broadcast issue-responsive programming in a wide range of categories.<sup>5</sup> Most respondents also indicated that they do not already routinely collect all the information proposed by the *Notice* to be collected in the online standardized disclosure form.<sup>6</sup>

In this regard, the Commission's proposal is not a mere substitution of an electronic filing requirement for a paper filing requirement.<sup>7</sup> Rather, the proposal would impose on broadcasters a new, content-based recordkeeping requirement, which would effectively constitute a change in the existing substantive regulatory scheme. The proposal includes the tracking and compilation of new information and the evaluation of program material to determine which of three narrowly-drawn content categories is satisfied—it is, in practice, a wholly different undertaking than the current obligations relating to issues/programs lists. To increase their collection efforts as proposed, survey respondents reported that they would require additional staffing; one station reported that

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<sup>5</sup> Responding stations reported airing programming used to satisfy the obligation to air programming that is responsive to the needs and interests of their communities in numerous categories, including local news, national news, international news, local civic/governmental affairs, PSAs, religious programming, emergency programming, and “other public interest programming.”

<sup>6</sup> This is not a trivial matter. Only approximately 20% of stations indicated that they currently maintained all of the information proposed to be collected and reported on the new disclosure form. Of these, one of the stations reported that it would be forced to divert resources currently used to provide high-quality programming to comply with the proposed reporting requirements.

<sup>7</sup> See *Notice* ¶ 23 (“This will be merely be [sic] a replacement reporting requirement, which the Commission has authority to impose. . .”).

the additional reporting “would practically double the man hours currently required” to complete quarterly issues/programs reports.

Certainly, the Associations support any effort to streamline stations’ disclosure of local television stations’ issue-responsive programming. The Associations cannot support, however, any change in the existing market-based public interest standard, particularly a change that is implemented under the guise of streamlining. Here, the introduction of restrictive content categories and new reporting requirements would provide only a narrow reflection of a station’s issue-responsive programming and would tack backward to a burdensome regulatory scheme. As an alternative, the Associations urge the Commission to consider the development and testing of a content-neutral standardized form which gives broadcasters the flexibility—as exists under the current rules—to identify, in their good faith judgment, examples of various types of programming (not predefined categories of programming) as responsive to community issues and concerns.

## **II. THE COMMISSION SHOULD NOT REQUIRE REPORTING IN NARROWLY-DRAWN CONTENT CATEGORIES**

The *Notice* seeks comment on the proposal that programming reporting be confined to narrowly-drawn content categories urged and defined by the advocacy coalition, PIPAC: local news, local civic/governmental affairs, and local electoral affairs.<sup>8</sup> The Associations contend that such restrictive reporting requirements are contrary to the Commission’s market-based approach to public interest programming and effectively impinge upon licensee discretion over programming.

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<sup>8</sup> *Notice* ¶¶ 25-29.



The Commission has correctly and repeatedly recognized that there is no one-size-fits-all formula by which broadcasters, or television stations specifically, can or should fulfill their localism obligations and serve their communities of license by providing community issue-responsive programming. This has been the Commission's consistent regulatory approach to public interest programming since the adoption of the *Television Deregulation Order* in 1984 where the Commission found that "licensees should be given this flexibility to respond to the realities of the marketplace by allowing them to alter the mix of their programming consistent with market demand."<sup>9</sup>

The Commission has concluded time and time again that looking at only one type of programming is not a valid basis on which to judge the localism performance of an individual station. Under the existing rules which recognize the realities of the marketplace, a station is not required to be all things to all people, but instead is permitted to make good faith judgments on how best to serve the public by taking into account, among other things, the programming otherwise available in the market.

For example, during the last license renewal cycle, in the case of a petition to deny filed against Milwaukee and Chicago area stations, the Commission concluded that performance or non-performance in a single category of programming (local electoral affairs in that case) was not dispositive of a licensee's compliance with its overall

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<sup>9</sup> *Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, 98 F.C.C. 2d 1076, ¶ 23, *aff'd in part, remanded in part, Action For Children's Television v. FCC*, 821 F.2d 741 (D.C. Cir. 1987) ("*Television Deregulation Order*").

obligations to provide responsive programming.<sup>10</sup> The Commission's decision there specifically referred to the enhanced disclosure proceeding.<sup>11</sup>

In another proceeding, the Commission again rejected a challenge to certain licensees' renewal applications based on the amount of local electoral affairs programming broadcast.<sup>12</sup> There, the Commission concluded that the challenge concerned only one type programming and therefore did not demonstrate that the programming of the stations at issue was generally unresponsive.<sup>13</sup> The decision further stated, "The Commission has long held that '[t]he choice of what is or is not to be covered in the presentation of broadcast news is a matter to the licensee's good faith discretion' and that 'the Commission will not review the licensee's news judgments.'"<sup>14</sup>

The proposal at issue here, though, threatens precisely to force the review of licensee news judgments by elevating the importance of only three categories of programming for reporting. Plainly, the suggestion is that a failure to provide enough of any of the three—notwithstanding the existence of other community-responsive programming— would somehow constitute a failure to serve the public interest.

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<sup>10</sup> See *Letter Re: Petitions to Deny filed by Chicago Media Action and Milwaukee Public Interest Media Coalition*, 22 FCC Rcd 10877 (2007). Here, PIPAC's proposal to include local electoral affairs as one of three core reporting categories is another attempt to require stations de facto to produce programming of this type. The Associations contend that it is no more appropriate to include it as an explicit category along with the local news and local civic/governmental affairs than it was in those proceedings.

<sup>11</sup> *Id.*

<sup>12</sup> See *Letter Re: Petition to Deny License Renewal Applications of Portland, Oregon Area Commercial Television License Stations*, DA 07-3609 (2007).

<sup>13</sup> See *id.* (quoting *American Broadcasting Companies, Inc.*, 83 FCC 2d 302, 305 (1980)).

<sup>14</sup> *Id.*

The Associations oppose such a view. It is inconsistent with both the First Amendment and the Commission's long-standing, market-based approach to regulation. The Commission has long recognized that single categories of programming—in particular, local electoral affairs—do not reflect whether a station's overall programming is generally responsive to the community. By organizing the online disclosure form into a mere three individual, content-based categories as proposed in the instant proceeding, the Commission would be encouraging the appearance of minimum requirements in three categories, a notion it has explicitly and repeatedly rejected in prior proceedings. Moreover, an emphasis on performance in any single category of programming is misguided and threatens to impinge upon a station's editorial discretion.

Under First Amendment principles, it is well-established that broadcast licensees are afforded broad discretion to choose from among the issues that are of concern to the community and to choose how best to gather, edit, schedule, and broadcast programming to address those issues.<sup>15</sup> Indeed, when the Commission eliminated its quantitative programming guidelines in the *Television Deregulation Order*, the Commission explicitly

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<sup>15</sup> See, e.g., *Office of Communication of United Church of Christ v. FCC*, 707 F.2d 1414, 1430 (D.C. Cir. 1983); *National Ass'n of Independent Television Producers & Distributors v. FCC*, 516 F.2d 526, 536 (2d Cir. 1975) (“[I]t may be that mandatory programming by the Commission even in categories would raise serious First Amendment questions.”); *Philadelphia Television Stations (Programming Issues)*, 5 FCC Rcd 3847, ¶¶ 8-9 (“The Commission will not interfere with the broadcaster's judgment without a showing that the broadcaster was unreasonable or discriminatory in its selection of issues . . . . [T]he licensee is not required to address every issue of concern to a particular group or every aspect of an issue that is addressed.”); *American Broadcasting Cos., Inc.*, 83 F.C.C. 2d 302 (1980), ¶ 10 (“The choice of what is or is not to be covered in the presentation of broadcast news is a matter committed to the licensee's good faith discretion.”); *Letter to Dr. Paul Klite*, 12 Comm. Reg. (P & F) 79 (MMB 1998).

acknowledged that a requirement to broadcast a specific type of programming raises First Amendment concerns.<sup>16</sup>

Television stations must have the freedom and flexibility to respond to the demands of the communities in their market. The content-based categories in the current proposal threaten to inch back toward pre-1984 content regulation that the Commission has expressly rejected. As the Commission stated in the *Television Deregulation Order*,

We believe that licensees should be given this flexibility to respond to the realities of the marketplace by allowing them to alter the mix of their programming consistent with market demand. Such an approach not only permits more efficient competition among stations, but poses no real risk to the availability of these types of programming on a market basis. This is particularly true in view of the continuing obligation of all licensees to contribute issue-responsive programming and their responsibility to ensure that the strongly felt needs of all significant segments of their communities are met by market stations collectively. The [pre-1984] guidelines. . . tend to restrict the freedom of individual licensees by requiring them to present programming in all categories. Such a requirement is unnecessary and burdensome in light of overall market performance.

*Television Deregulation Order*, 98 F.C.C. 2d 1076, ¶ 23.

Even within a market, a station is afforded flexibility to provide programming on a number of issues that are different than other stations. The Commission's policy to allow licensee discretion means that television stations function as part of a larger marketplace that, in the aggregate, addresses the various issues faced by the community. In other words, *each* station in a market does not need to address the *same* community issues as every other station. The Commission explicitly recognized this principle in the *Television Deregulation Order*:

The significance of our new regulatory scheme lies not only in its impact on the programming behavior of licensees in today's video marketplace,

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<sup>16</sup> See *Television Deregulation Order*, ¶¶ 27-28.

but also in its flexibility in accommodating the natural economic incentives of the developing video marketplace. For example, as the number of video outlets increases, a television licensee may, in response to economic incentives, begin to direct its programming towards a narrower audience. Unlike the existing guidelines, the new regulatory approach fosters this development by allowing the licensee to consider the programming of other television stations in its market in fulfilling its programming responsibilities.

*Television Deregulation Order*, 98 F.C.C. 2d 1076, ¶ 34.

For the Commission to organize mandatory disclosure of programming into three prescribed, restrictive categories threatens, at a minimum, to create the appearance of a higher value on certain types of public interest programming and a public expectation of only certain types of programming, and, at worst, to create a *de facto* requirement that a licensee will engage in those specific types of programming.<sup>17</sup> This potential result betrays a fundamental understanding of the discretion afforded licensees under the Commission's policies, the Communications Act, and the First Amendment. As recognized by the Commission:

Section 326 of the Communications Act and the First Amendment to the Constitution prohibit any Commission action which would improperly interfere with the programming decisions of licensees. . . . In meeting this obligation [to address community issues with responsive programming], licensees may address community issues with *whatever types of programming they determine to be appropriate* to respond to those issues. In challenging a licensee's programming performance, a petitioner must demonstrate that a licensee is failing to address issues facing the community in its

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<sup>17</sup> This concern is not alleviated by the proposed "voluntary" additional reporting, which is, essentially, an "other" programming category in which to shoehorn national news, international news, PSAs, religious programming, emergency programming, and other stripes of issue-responsive programming. See *Notice* ¶ 29. The very nature of the proposal as additional and voluntary suggests an expectation of or higher value on the three "core" categories of programming and that a degree of superfluidity inheres in these other programming categories. Moreover, if stations list most of their programs in this "other" category, as the Associations expect their members might do, then the three designated categories would themselves be, in practice, unhelpful and superfluous.

overall programming, not merely that a particular issue is not being addressed.

*National Broadcasting Co., Inc.*, 14 FCC Rcd 9026 (1999), ¶¶ 18-19 (emphasis added).

Further, the proposed narrow categories of programming are too restrictive to provide meaningful information to the public. In practice, conforming a station's programming to PIPAC's proposed three core categories would simply invite debate over how particular programs should be categorized, which would not be helpful to the Commission, the public, or to television stations.<sup>18</sup> Most respondents to the Associations' survey reported programming in most, if not at all, of the categories of local news, national news, international news, local civic/governmental affairs, national civic/governmental affairs, PSAs, religious programming, emergency programming, and other types programming responsive to their communities.<sup>19</sup> For a station whose community issue-responsive programming primarily or entirely falls outside the proposed three core categories, as many stations' programming would, the new report form would give the false appearance that the licensee failed to meet its obligations. Under such

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<sup>18</sup> The Associations observe that, while the Commission intends in this proceeding to enhance dialogue between the public and television stations regarding public interest programming, this kind of debate over semantics is not the result the Commission actually intends. The Associations agree that meaningful, substantive dialogue about public interest programming is an important component of a station's service to its local community and its obligations to provide issue-responsive programming, but disagreement over the semantics of which category a program fits into would not be meaningful. *Cf. Television Deregulation Order*, 988 F.C.C. 2d 1076, ¶ 52 (reiterating the Commission's own view that the Commission's "experience with ascertainment in the adversarial arena [w]as 'litigation over trivia' ...[that] relat[es] to mechanistic aspects of the process.").

<sup>19</sup> For more than 50 years, the Commission has recognized that certain, enumerated content-based categories are not the only way to serve the public interest or provide community-responsive programming. In the 1960 *En Banc Programming Inquiry*, for example, the Commission recognized no fewer than *fourteen* programming categories as "relevant to a broadcaster's programming," and further recognized that the "these categories were not intended to be all-embracing or constant." *Notice* ¶ 22, n.73 (quoting *En Banc Programming Inquiry*, 44 F.C.C. 2303, 2314 (1960)).

circumstances, the report would, at a minimum, be confusing and misleading to the public. As a practical matter, where the bulk of a station's programming falls into categories other than the three core categories, the three categories themselves would also not serve any meaningful or organizational purpose.

In summary, the proposed content-based categories are likely to be confusing and distracting to the public, unhelpful for the Commission, and threatening to stations' editorial discretion. The Associations urge the Commission to adhere to its long-standing market-based approach that will sufficiently ensure accountability to the station's community without unduly burdening local television stations.<sup>20</sup>

### **III. THE COMMISSION SHOULD NOT IMPOSE STANDARDIZED DISCLOSURE USING A BURDENSOME SAMPLE-BASED METHODOLOGY**

As stated, for nearly 30 years now, the Commission has followed a market-based approach to public interest programming.<sup>21</sup> The FCC determined that the quarterly issues/programs list requirement (as it exists now, *see* 47 C.F.R. §73.3526(e)) would “fully meet [its] current regulatory needs with respect to the programming performance of commercial television broadcasters, while permitting the elimination of unnecessary and often burdensome regulations.”<sup>22</sup> At that time, the Commission was acting to

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<sup>20</sup> *See Television Deregulation Order*, 98 F.C.C. 2d 1076, ¶ 2 (finding that “market incentives will ensure the presentation of programming that responds to community needs and provide sufficient incentives for licensees to become and remain aware of the needs and problems of their communities”).

<sup>21</sup> *See Television Deregulation Order*, 98 F.C.C. 2d 1076, ¶ 3.

<sup>22</sup> *Id.*

eliminate burdensome composite reporting in specific categories. It eliminated burdensome program logging rules and composite week programming analyses.<sup>23</sup>

The current proposals in the *Notice* threaten to take steps back toward this flawed and restrictive model that the FCC has previously rejected. The Commission has, appropriately, followed a model where broadcasters are permitted discretion in identifying examples of their programming that serves the public interest. This approach minimizes the regulatory burden by permitting broadcasters to track relevant programming as they air it on an example basis. By contrast, the Commission's new proposal would force broadcasters to report, on a survey or composite basis, all programming in defined categories and to track specified information for each program. By definition, such a requirement would require that broadcasters institute extensive recordkeeping practices, effectively reinstituting programming logging abandoned by the Commission nearly 30 years ago.

As the FCC correctly identified in 1984, a market-based approach to programming disclosure allows for essential freedom and flexibility on the part of television broadcasters to respond to specific community needs. Unnecessary regulatory burdens will impede the ability of licensees to meet their obligations to provide programming that responds and adjusts to relevant issues of concern to the community. In particular, television stations would be burdened by the proposed requirements to report programming on a segment-by-segment basis, as most stations report that they log this information on a program-by-program basis. The proposed composite "exception" to

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<sup>23</sup> Composite week analysis requires a 24/7/365 logging rule. The Commission chose, instead, to require a list of examples of issue-responsive programming selected by the broadcasters.



require reporting of *all* local electoral affairs programming during election season would also impose a new burden on stations, especially when political and issue advertising are currently excluded from programming reporting requirements.<sup>24</sup> Stations would also be burdened by the process of collecting and retaining detailed programming information if they are not provided with advance notice of the relevant reporting days for that quarter.<sup>25</sup> The Associations are opposed to the proposed composite methodology to the extent it would embrace a counter-productive “gotcha” practice and impose additional recordkeeping requirements on stations.

Since streamlining the obligations of television stations to report issue-responsive programming three decades ago, the FCC has not undertaken a comprehensive study or evaluation of the effectiveness of the current market-based model and issues/programs lists. Rather, the *Notice* launches the current proposal wholesale on the recommendation of an advocacy group without independent empirical data or working groups to fully vet the potential needs, purposes, costs, and benefits of the proposals.<sup>26</sup>

#### **IV. THE COMMISSION SHOULD CONSIDER ALTERNATIVES FOR A CONTENT-NEUTRAL ONLINE REPORTING FORM**

As discussed above, the programming disclosure rules are intended to inform the community and the Commission of a licensee’s compliance with its obligation to provide issue-responsive programming. The Associations generally would not oppose a standardized online form for reporting community issue-responsive programming so long

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<sup>24</sup> See *Notice* ¶ 20.

<sup>25</sup> See *Notice* ¶ 18.

<sup>26</sup> See *Notice* ¶ 25 (seeking comment on PIPAC’s proposed categories and the proposed form as it appears on PIPAC’s website at <http://www.savethenews.org/sampleform>).

as the form (1) would result in an overall reduction to regulatory burden for broadcasters, and (2) would be constructed in a manner that would not prejudice the issue of what programming constitutes public interest programming. At this stage, it is too early to assess the costs and benefits of an appropriate standardized form for television stations. The Associations would support a working group test to evaluate a content-neutral form so that the true costs of implementing a new requirement could be assessed.

### **CONCLUSION**

The Associations respectfully request that the Commission consider these Comments and consider content-neutral alternatives to the proposed standardized disclosure form for television broadcasters.

Respectfully submitted,

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